Richard J. Bolen, Esq. 33878

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

CHOICE LANDS, LLC, a West Virginia limited liability company,

Plaintiff,

v.

Civil Action No. 05-C-530
Judge David M. Pancake

NONDUS TASSEN, individually and as executrix for the Estate of Billy L. Tassen, and KENNETH JONES and JOYCE JONES

Defendants,

v.

NONDUS TASSEN, individually and as Executrix for the Estate of Billy L. Tassen,

Third Party Plaintiff,

v.

OLD COLONY COMPANY and BETTY P. SARGENT,

Third Party Defendants.

ORDER DENYING PLAINTIFF'S "MOTION FOR RECONSIDERATION OF ORDER GRANTING JONES DEFENDANTS' 'MOTION FOR JUDGMENT ON THE PLEADINGS' OR, IN THE ALTERNATIVE, FOR RELIEF FROM THAT ORDER"

This 11th day of January, 2007, the Court considered the Plaintiff's "*Motion for Reconsideration of Order Granting Jones Defendants' 'Motion for Judgment on the Pleadings' or, in the alternative, Motion for Relief from that Order,*" filed in response to this Court's Order entered July 20, 2006, pursuant to argument heard on April 26, 2006, concerning the "*Motion for Judgment on the Pleadings,*" filed herein by the Defendants

Kenneth and Joyce Jones (the "Joneses" or the "Jones Defendants"). In its Motion, the Plaintiff, Choice Lands, LLC, ("Choice Lands" or the "Plaintiff"), seeks relief from the Order entered by this Court on July 20, 2006, in which the Court dismissed the Plaintiff's claims against the Jones Defendants based upon the pleadings, pursuant to Rule 12(c) of the West Virginia Rules of Civil Procedure. The Plaintiff contends that the Order was not a proper final order under Rule 54(b) of the West Virginia Rules of Civil Procedure, and moves the Court to use its plenary power over non-final orders to modify said Order. In the alternative, the Plaintiff moves the Court to grant relief from the Order pursuant to Rule 60 of the West Virginia Rules of Civil Procedure. Based upon the pleadings, exhibits, and oral and written argument of counsel for the parties, the Court DENIES the Plaintiff's Motion, and specifically finds and concludes as follows:

FINDINGS OF FACT

1. The Plaintiff's Motion arises from the Court's entry on July 20, 2006 of an Order, pursuant to an April 26, 2006 argument, at which the Court granted the Joneses' Motion for judgment on the pleadings.

2. In that Order of July 20, 2006, the Court found that the pleadings clearly showed that the easement in question had existed prior to and subsequent to the Joneses' acquisition of

title and that the easement had been there since November 16, 1973 and that the Joneses have owned the property and used the easement since July 12, 1978.

3. The Court also found that the easement had been used continuously in its same location by the Joneses since they acquired the property, without objection by the Defendant Tassen, who originally granted the easement to the Joneses' predecessors.

4. The Court also found that a reasonable inspection of the property by the Plaintiff prior to the purchase would have disclosed the location of the existing gravel driveway and the Court also found that there was no mutual agreement to relocate the Joneses' easement.

5. In its Motion for Reconsideration, the Plaintiff claims that new and material facts have come to light since the April 26, 2006 hearing and also subsequent to the July 20, 2006 entry of the Order pursuant to that hearing. Specifically, the Plaintiff claims that the Joneses' easement over lots 10, 11, 12 and 14 does not give them the right to use lot 13 at all, and consequently does not give them the right to use the gravel driveway that they claim the right to use because the existing gravel driveway crosses lot 13. The Plaintiff argues that, in the absence of an easement over lot 13, the Joneses have no

right to use the gravel driveway and, therefore, no existing right-of-way into their residence.

6. The Plaintiff next argues that it reasonably relied upon the failure of Kenneth Jones to object to Billy L. Tassen's representation, made to the Plaintiff in Mr. Jones' presence, that the Joneses' use of the gravel driveway was merely permissive and that Mr. Tassen effectively terminated such permissive use prior to the consummation of the sale of the property to the Plaintiff. The Plaintiff asserts that Kenneth Jones' failure to object to Mr. Tassen's representations about the use of the driveway created detrimental reliance and that the Joneses should, therefore, be estopped from denying these representations after the transaction.

7. The Plaintiff also argues that this Court used the wrong standard in evaluating the motion for judgment on the pleadings. The Plaintiff believes the Court cited the proper case, *Copley v. Mingo Board of Education*, 466 S.E.2d 139 (W. Va. 1995), but misapplied the standards set forth therein. Specifically, the Plaintiff states that the Court overlooked Syllabus Point 2 of *Copley*, which states that a "motion will not be granted except when it is apparent that the deficiency could not be cured by an amendment." The plaintiff argues that the recent survey conducted which allegedly shows that the gravel

driveway violates the express terms of the easement is sufficient to cure any perceived deficiency in the pleadings.

8. With regard to the standard to be applied to reviewing the Plaintiff's Motion, the Plaintiff argues that the July 20, 2006 order does not meet the requirements of finality under Rule 54(b) of the West Virginia Rules of Civil Procedure. Rule 54(b) states "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment."

9. The July 20, 2006 order, entered pursuant to the April 26, 2006 hearing, stated at paragraph five under "Conclusions of Law", "That the court further concludes that this is a final and appealable order despite the fact that further issues exist between the remaining parties to this litigation. That based upon the court's finding that this is a final and appealable order that plaintiff's appeal period to contest this order before the West Virginia Supreme Court shall begin to run on the date of entry of this order."

CONCLUSIONS OF LAW

1. The Court is of the opinion that the expressed language contained in paragraph five under "Conclusions of Law" is sufficient to satisfy the finality requirement of Rule 54(b). In *Hubbard v. State Farm Indemnity*, 584 S.E.2d 176, 183-184 (W.

Va. 2006), the Supreme Court of Appeals, quoting from *State ex. Rel. McGraw v. Scott-Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516 (W. Va. 1995), said "the key to determining if an order is final is not whether the language from Rule 54(b) of the West Virginia Rules of Civil Procedure is included in the order, but is whether the order approximates a final order in its nature or effect." The Court concludes that the language in paragraph five quoted above is sufficient to satisfy this standard and that the Plaintiff's Motion for Reconsideration should therefore be reviewed under Rule 60(b) of the West Virginia Rules of Civil Procedure.

2. Rule 60(b) of the West Virginia Rules of Civil Procedure states:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment,

> order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant statutory relief in the same action to a defendant not served with a summons in that action, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, petitions for rehearing, bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

3. One of the Plaintiff's primary arguments is that the original survey did not show that the gravel driveway passes over lot 13 and therefore violates the express terms of the easement grant. The plaintiff argues that all parties, including the Court, failed to note this incursion onto lot 13 and that these failures constitute mutual mistakes, in addition to being a newly discovered and material fact.

4. The Court agrees that the lot 13 issue was not previously raised, but finds it difficult to understand how this can be considered a newly discovered fact since the easement has been in place for 27 years. Lot 13 was owned by the Tassens, who did not object to the Joneses' motion for judgment on the pleadings and who stated that the easement was specific. The Tassens had always allowed the Joneses to cross lot 13, at least prior to Mr. Tassen's termination of any such permissive use,

thus establishing it is a part of the easement due to its 27 years of continuous use.

5. Since lot 13 has been part of the easement for 27 years, the Court concludes that the Plaintiff's argument fails to satisfy the language of Rule 60(b), which allows relief from an order for "[n]ewly discovered evidence which by due diligence could not have been discovered." One using due diligence in an investigation of the easement in question should have discovered that the gravel driveway crossed lot 13. Therefore plaintiff's argument that it constitutes newly discovered evidence fails.

6. With regard to the Plaintiff's argument that, pursuant to Syllabus Point 2 of *Copley*, the lot 13 evidence should preclude granting of the Joneses' Motion, since "a motion will not be granted except when it is apparent that the deficiency could not be cured by amendment," the Court concludes that the Plaintiff's lot 13 argument does not cure the deficiency in question. While the easement language does not mention lot 13, the continuous use of the gravel driveway for 27 years, without objection, has established the easement, despite the fact it is not set forth in a metes and bounds description.

7. The Court concludes that the Plaintiff's estoppel argument also fails. The Plaintiff claims that Mr. Jones' silence at the meeting with Mr. Billy Tassen and Bruce Johnson, in which Mr. Tassen allegedly told Mr. Jones that the easement

was being terminated, caused the Plaintiff to detrimentally rely on this silence and to go forward with the purchase of the property under the assumption that the easement had been terminated. Instead of relying on Mr. Jones' silence, the Court concludes that the Plaintiff had a duty to investigate the easement in question; the Plaintiff may not maintain an estoppel argument based upon Mr. Jones' silence when a reasonable inspection of the property would have disclosed that easement prior to the purchase.

8. The Plaintiff also seeks relief under the catchall provisions of Rule 60(b)(6), arguing that the Jones have offered no affirmative evidence regarding the lot 13 "trespassing," and that additional evidence and argument are needed to resolve this issue. The Court concludes that, since the easement has been place for 27 years and has been established through continuous use, the Plaintiff's argument is unpersuasive.

9. The Court therefore concludes that the Plaintiff has not satisfied the requirements of Rule 60(b) and, therefore, denies the Plaintiff's Motion.

WHEREFORE, it is hereby ORDERED that the Plaintiff's "Motion for Reconsideration of Order Granting Jones Defendants' 'Motion for Judgment on the Pleadings' or, in the alternative, Motion for Relief from that Order," is DENIED. Because of the issues raised by the Plaintiff with regard to the finality of

the Order entered July 20, 2006 and the possibility that such Order might be characterized as a non-final "*Durm*-type" order, as interpreted in *Hubbard*, the Court is now directing entry of a final judgment as to the ruling that it made April 26, 2006, and manifested by written order entered July 20, 2006. The present ruling and order are inextricably intertwined with the July 20, 2006 Order, and, for legal and equitable reasons, this Court considers that the appeal time for both orders should run concurrently from the entry of this order.

The Court therefore expressly finds that, with regard to the present ruling and the prior Order of July 20, 2006, as interpreted herein, there is no just reason for delay and expressly directs the entry of judgment by the clerk. To the extent that any findings or conclusions made herein could impair the Plaintiff's ability to appeal both orders, the Court expressly states that the Court and all the parties hereto agree and understand that the Plaintiff's Motion was filed based upon its interpretation of that July 20, 2006 Order, and while the Court might disagree with that interpretation, the Court does not believe that the Plaintiff's appeal time should begin to run for either order until entry of this order. The present order constitutes a modification of or amendment to the July 20, 2006 Order.

The Plaintiff's objections and exceptions are noted, and the Court's previous scheduling order in this matter is set aside. Discovery is to be held in abeyance pending further action by the Court and the status of the Plaintiff's appeal to the Supreme Court of Appeals, if any.

The Clerk is directed to mail a copy of this Order as entered to counsel as indicated below:

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Entered: May 14, 2007

/s/ DAVID M. PANCAKE

David M. Pancake, Judge
Circuit Court of Cabell County

STATE OF WEST VIRGINIA
COUNTY OF CABELL, TO WIT:
I, ADELL CHANDLER, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT ENTERED ON MAY 14 2007
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS MAY 14 2007
Adell Chandler, CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

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